U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

DLP

FILE: WAC 02 167 53841 Office: CALIFORNIA SERVICE CENTER Date: [illegible]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a nursing registry firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner states that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner asserts that it has had the continuing financial ability to pay the beneficiary's proffered wage and requests reversal of the director's decision.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(d) further provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS]."

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is April 22, 2002. The beneficiary's salary as stated on the labor certification is $16.30 per hour or $33,904 per annum, based on a 40-hour week. The visa petition states that the petitioner was established in 1996 and has 1,109 employees.

As the record initially contained insufficient evidence relating to the petitioner's continuing ability to pay the proffered wage, on August 19, 2002, the director instructed the petitioner to submit its financial evidence related to 2001, as well as further evidence of the business relationship between the petitioner, its customers, and the beneficiary's proposed employment.

The petitioner's response included a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. The petitioner declared a gross income of over 19 million dollars, salaries and wages paid of over 1 million, and claimed a taxable income loss of approximately $354,938. Schedule L reflected that its current liabilities exceeded its current assets.

The petitioner provided sample copies of contracts with ten of its health care facility customers as well as a master list of 137 hospitals with which it has contracts to supply medical personnel. The petitioner also submitted a letter, dated August 20, 2002, from [redacted] s the controller of the petitioning business. She explains the nature of the petitioner's business and further states:

> Our company has shown tremendous growth over the last few years. For the period ending December 31, 2001, the company grossed an annual income of 19.5 million dollars. We also have a 2.5 million dollar line of credit with Heritage Capital Group.
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> Based on the above information, we feel that we have the ability to pay the proffered wage for the nurses we have petitioned.

In denying the petition, the director chose not to accept the controller's assurances as to the financial health of the company. The director did not specifically articulate why the controller's letter was not acceptable, but determined that the petitioner's declared tax loss and lack of net current assets, as shown on its 2001 tax return, failed to demonstrate its ability to pay the beneficiary's proposed annual wage of $33,904.

On appeal, counsel asserts that the petitioner's tax return does not fully reflect its financial status as it has consistently paid significant amounts as salaries and wages and has experienced rapid growth. Counsel submits a letter from the petitioner's accountant, [redacted] explains that he has been the petitioner's accountant since 1998 and has seen an increase in the petitioner's revenue from 12 million to nearly 24 million dollars in 2002. He submits a financial statement and suggests that if the accrual rather than cash accounting method were used, then the petitioner would show a healthy profit. He maintains that the petitioner has never missed paying all salaries and wages when due.

In this case, the AAO concurs with counsel. The regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). Although the director retains the discretion to reject the assurances of a financial officer in some cases, this alternative recognizes that large employers may have large net tax losses but remain fiscally sound and retain the ability to pay the proposed wage offer.

In this case, although the petitioner's federal tax return showed a net loss for 2001, the balance of the evidence indicates that the petitioner has been in business for eight years, grossed over 19 million in 2001, paid over 1

million dollars in salaries and wages, has contracts with multiple medical facilities, and is producing increasing revenues. Here, the totality of the circumstances reflecting the magnitude of the petitioner's operations in conjunction with the favorable regulatory language relating to large employers at 8 C.F.R. § 204.5(g)(2), weighs in the petitioner's favor. Based on the evidence contained in the record, it can be concluded that the petitioner has demonstrated the continuing ability to pay the proffered wage as of the priority date of the petition.

The case is being remanded to the director for determination of several issues related to the petitioner's lack of specificity of a specific geographical location and place of actual employment of the beneficiary. The employment of aliens under Schedule A occupations must not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* 20 C.F.R. § 656.10. Schedule A regulations do not contain language that certifies the employment of any alien registered nurse anywhere in the United States, at any wage rate. CIS has jurisdiction under 20 C.F.R. § 656.22(e). The regulations at 20 C.F.R. § 656.20(c)2) state that a labor certification application must clearly show that the wage offered meets the prevailing wage rate, and references 20 C.F.R. § 656.40.

In this case, in response to the director's August 19, 2002, request for additional evidence in order to ascertain the nature of pre-existing contracts between the beneficiary and her prospective duty station, the petitioner responded that the alien will engage in a seven-week clinical preceptorship program at one of three locations, and, upon completion, she may work at one of 137 hospitals with which the petitioner has contracts. This presents a problem with the regulations describing the procedure to post a job notice. The regulations at 20 C.F.R. § 656.20(g)(1) state:

> In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
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> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area intended employment.
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> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 C.F.R. § 516.4 or occupational safety and health notices required by 20 C.F.R. § 1903.2(a).

Under the regulation, the notice must be posted at the facility or location of the beneficiary's employment. The AAO holds this to mean the place of physical employment. Because the petitioner, whose business is to contract with third-party clients, has failed to actually identify the beneficiary's actual "facility or location of the employment," it raises a question as to how the petitioner can comply with the regulations governing the

posting of the job notice. By merely posting the notice of the position at the petitioner's administrative office, it does not appear that the petitioner has complied with the requirement.

It is further noted that by not identifying a specific geographical location where the proffered position will be performed, the petitioner may have failed to show that its proffered wage meets the prevailing wage rate. The regulation at 20 C.F.R. § 656.20(c) requires a prospective U.S. employer in Schedule A labor certification cases to make certain certifications. Relevant to the issue of offering wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification: "The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." *See* 20 C.F.R. § 656.20(c)(2). The prevailing wage rate is further defined at 20 C.F.R. § 656.40 as follows:

> **Determination of prevailing wage for labor certification purposes.**[1]
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> (a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wag rate as required by 656.21(b)(3), shall be determined as follows:
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> . . . .
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> (2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:
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> (i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages;
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> . . . .

Because the director did not address these issues in his decision, this petition will be remanded for his consideration of the petitioner's evidence relevant to the notice of the job posting at a specific geographical location describing the job and rate of pay consistent with the prevailing wage rate in that location. The director may request any additional evidence deemed relevant. Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all

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[1] The Department of Labor maintains a website at www.ows.doleta.gove which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically. If a proffered position sets forth basic responsibilities of a nurse under supervision, does not specify an advanced level of training or experience or supervisory duties, it is a Level I position. The position, not the beneficiary's qualifications is the focal point of the analysis. *See* TEGL No. 5-02, published by the Department of Labor.

evidence, the director will review the record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.